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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

Nos. 577-581.

RICKERT RICE MILLS, INC.,

Petitioner,

v.

RUFUS W. FONTENOT, Individually and as Acting United States Collector of Internal Revenue for the District of Louisiana.

Respondent.

A. B. DORE,

Petitioner,

v.

RUFUS W. FONTENOT, Individually and as Acting United States Collector of Internal Revenue for the District of Louisiana.

Respondent.

UNITED RICE MILLING PRODUCTS CO., INC.,

Petitioner,

v.

RUFUS W. FONTENOT, Individually and as Acting United States Collector of Internal Revenue for the District of Louisiana.

Respondent.

BATON ROUGE RICE MILL, INC.,

Petitioner,

v.

RUFUS W. FONTENOT, Individually and as Acting United States Collector of Internal Revenue for the District of Louisiana.

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T. SIMON,

Petitioner,

v.

RUFUS W. FONTENOT, Individually and as Acting United States Collector of Internal Revenue for the District of Louisiana.

Respondent.

BRIEF OF AMICI CURIAE.

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THE COURT PRESS, N. Y. C.

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Respondent.

No. 578.

A. B. DORE,

Petitioner,

v.

RUFUS W. FONTENOT, Individually and as Acting United States Collector of Internal Revenue for the District of Louisiana,

Respondent.

No. 579.

UNITED RICE MILLING PRODUCTS CO., INC.,

Petitioner,

v.

RUFUS W. FONTENOT, Individually and as Acting United States Collector of Internal Revenue for the District of Louisiana,

Respondent.

No. 580.

BATON ROUGE RICE MILL, INC.,

Petitioner,

v.

RUFUS W. FONTENOT, Individually and as Acting United States Collector of Internal Revenue for the District of Louisiana,

Respondent.

No. 581.

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Respondent.

BRIEF OF AMICI CURIAE.

I.

Statement.

Hygrade Food Products Corporation, National Biscuit Company, a corporation, and P. Lorillard Company, a corporation, file this brief amici curiae in opposition to the contention of the petitioner that the Agricultural Adjustment Act, familiarly known as the AAA, is constitutional and gives to petitioner the right to assess and collect taxes in the manner and for the purposes it provides.

Each of said concerns is a processor of a basic agricultural commodity in one or more factories located and operated in the United States. As such

it is subject in that respect to the terms and provisions of said AAA. And against each the United States is asserting its right to assess and collect, under the terms and provisions of said Act, taxes accrued and accruing before and after the 1935 Amendments.*

Each of these concerns has brought a suit in equity in a Federal District Court (as have other like concerns, so that the number of such suits now aggregate largely over one thousand) in which is sought an order restraining the further collection under said Act of taxes accrued both before and after the amendments of August 24th, 1935, on the ground that it is wholly unconstitutional and that the claim for refund, for many years existing as an established procedure for contesting such constitutionality, has been so circumscribed by limitations thereof by Sec. 21, added by Sec. 30 of the 1935 Amendments, as to make said procedure an inadequate legal remedy and entirely lacking in the elements of due process of law required for that purpose.

Thus each of said suits presents the very same constitutional questions that are involved in the above entitled suit, as well as the right of these concerns to contest such constitutionality by suit in equity, in view of the exceptional circumstances presented by the novel provisions of the AAA and the inadequacy of, and lack of due process in, the procedure by claim for refund under the said limitations thereon.

II.

Unconstitutionality of AAA as amended.

These amici curiae, with the required consents, have filed in this Court in the case of *United States*

* Public No. 320, 74th Congress, approved August 24th, 1935, for brevity in this brief called "the 1935 Amendments".

of America, Petitioner v. *William M. Butler and others, Receivers of Hoosac Mills Corporation, Respondents,* No. 401 of the October Term, 1935, a brief dealing with the questions presented in that case as to AAA but which did not include a consideration of the remedies of the processor.

Because the case in which that brief has been filed will be argued so shortly before the argument of the instant cases and it is therefore probable that it and the instant cases will be under consideration by this Court at the same time, to avoid duplication we respectfully refer the Court to that brief for a discussion of the constitutionality of the AAA.

Since the preparation of that brief an important discussion bearing on the general subject has come to our attention. It is "A Discourse on the Constitution and Government of the United States" by John C. Calhoun, prepared by him in 1848-9, left in manuscript at his death and published in 1851 under the editorship of Mr. Richard K. Cralle by "direction of the General Assembly of the State of South Carolina."

Calhoun has been incorrectly quoted as a supporter of the Hamilton theory because of his early leanings. In his speech in Congress on February 20, 1837:

> "Mr. Calhoun admitted that, when a young man and at his entrance upon political life, he had inclined to that interpretation of the Constitution which favored a latitude of powers; *but experienced observation and reflection had wrought a great change in his views; and above all, the transcendent argument of Mr. Madison himself in his celebrated Resolutions of 1798 had done more than all other things to convince him of his error.* The

> opposite course tended to a Government of unlimited powers * * *'' (25th Cong., 1st Sess., and The Works of John C. Calhoun (1857) III, 36, 41).

His Discourse on the Constitution amplifies and enforces this changed view and in so doing demonstrates the error of, opposition to, and evils from, the Hamilton theory.

Thus, referring in this Discourse to Hamilton's report on Manufactures, which is the well-known source of the claimed larger signification of the welfare clause, Calhoun says:

> "During the same Congress, a foundation was laid for other and great departures; the results of which, although not immediately developed, *have since led to the most serious evils.** I refer to the report of the Secretary of the Treasury on the subject of manufactures. He contended, not only that duties might be imposed to encourage manufacturers, but that it belonged (to use his own language) 'to the discretion of the national Legislature to pronounce upon the objects which concern the general welfare, and for which, under that description, an appropriation of money is requisite and proper. And there seems to be no doubt, that whatever concerns the general interests of agriculture, of manufactures and of commerce, is within the sphere of the national councils, as far as regards an application of money.' *It is a bold and an unauthorized assumption,* that Congress has the power to pronounce what objects belong, and what do not belong to the general welfare; and to appropriate money, at its discretion, to such as it may deem to belong to it.

* Italics ours, unless otherwise noted.

No such power is delegated to it;—nor is any such necessary and proper to carry into execution those which are delegated. On the contrary, to pronounce on the general welfare of the States is a high constitutional power, appertaining not to Congress, but to the people of the several States, acting in their sovereign capacity. *That duty they performed in ordaining and establishing the constitution. This pronounced to what limits the general welfare extended, and beyond which it did not extend.* All within them, appertained to the general welfare, and all without them, to the particular welfare of the respective States. The money power, including both the taxing and appropriating powers, and all other powers of the federal government are restricted to these limits. *To prove, then, that any particular object belongs to the general welfare of the States of the Union, it is necessary to show that it is included in some one of the delegated powers, or is necessary and proper to carry some one of them into effect,—before a tax can be laid or money appropriated to effect it. For Congress, then, to undertake to pronounce what does, or what does not belong to the general welfare,—without regard to the extent of the delegated powers,—is to usurp the highest authority;—one belonging exclusively to the people of the several States in their sovereign capacity"* (pp. 349-51).

In addition to thus forcefully repudiating the Hamilton theory, because of its violation of Constitutional principles, Calhoun definitely adopts the Madison theory as expressed by him in his Report on the Virginia Resolutions, from which we quoted on

pages 42-3 of our brief. Referring to this report, Calhoun says:

> "At the next session of the General Assembly of Virginia, these resolutions were referred to a committee, of which Mr. Madison was the chairman. The result was a report from his pen, which triumphantly vindicated and established the positions taken in the resolutions. * * * *It conclusively refutes the position, taken by Gen. Hamilton, that it belongs to the discretion of the national legislature to pronounce upon objects, which concern the general welfare, as far as it regards the application of money, already quoted;* denies the right of Congress to use the fiscal power, either in imposing taxes, or appropriating money, to promote any objects but those specified in the constitution;—shows that the effect of the right, for which he contends, would necessarily be consolidation,—by superseding the sovereignty of the States and extending the power of the federal government to all cases whatsoever; and that, the effect of consolidation would be to transform our federal system into a monarchy" (pp. 356-8).
>
> "The report of Mr. Madison, and the Virginia and Kentucky resolutions, constituted the political creed of the State rights republican party. They were understood as being in full accord with Mr. Jefferson's opinion, who was its acknowledged head. They made a plain and direct issue with the principles and policy maintained by Gen. Hamilton,—who, although not nominally the head of the federal party, as they called themselves, was its soul and spirit. The ensuing presidential election was contested on this issue, and terminated in the defeat of Mr. Adams, the election of Mr. Jefferson as President, and the elevation of the republican party

> into power. To the principles and doctrines, so plainly and ably set forth in their creed, they owed their elevation, and the long retention of power under many and severe trials. *They secured the confidence of the people, because they were in accord with what they believed to be the true character of the constitution, and of our federal system of government*" (pp. 358-9).

He then traces the operation of the unlimited Hamilton theory, showing its political and economic evils through the years of his experience, and concludes that among the steps to confine the Federal Government within its just powers "one of the most important will be, the repeal of all acts by which the money power is carried beyond its constitutional limits, either in laying duties or in making appropriations", because

> of all the powers ever claimed for the government of the United States, that which invests Congress with the right to determine what objects belong to the general welfare,—to use the money power in the form of laying duties and taxes, and to make appropriations for the purpose of promoting such as it may deem to be of this character, is the most encroaching and comprehensive. In civilized communities money may be said to be the universal means, by which all the operations of governments are carried on. If, then, it be admitted, that the government of the United States has the right to decide, at its discretion, what is, and what is not for the common good of the country, and to lay duties and taxes, and to appropriate their proceeds to effect whatever it may determine to be for the common good, it would be difficult to assign any limits to its authority, or to pre-

vent it from absorbing, finally, all the reserved powers, and thereby, destroying its federal character" (pp. 384-5).

The solution, of course, is an adherence to the cardinal principle that the "end" sought to be accomplished must be both "legitimate" and "within the scope of the Constitution", which this Court has applied as the test of the revenue, as well as of the other, powers as we have already shown in our brief in the *Hoosac Mills* case (p. 37).

In the *Passenger* cases in 1849 (7 How. at 446-7) Mr. Justice Catron said:

> "*Nor has Congress power to lay taxes to pay the debts of a State, nor to provide by taxation for its general welfare.* Congress may tax for the treasury of the Union, and here its power ends."

So in 1869, in *Veazie Bank* v. *Fenno* (8 Wall. at 541) this Court said of the Federal taxing power:

> "There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power if so exercised as to impair the separate existence and independent self-government of the States, or *if exercised for ends inconsistent with the limited grants of power in the Constitution.*"

And in the *Child Labor* case (259 U. S. 20), the Court quoted with approval (p. 41) the quotation last above made and held that a tax imposed to regulate child labor in factories was unconstitutional, because:

> "This case requires as did the *Dagenhart*

case the application of the principle announced by the Chief Justice Marshall in *McCulloch* v. *Maryland,* 4 Wheat. 316, 423, in a much quoted passage:

> " 'Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land' " (pp. 39-40).

III.

The novel and drastic limitations imposed by the 1935 amendments on claims for refund of taxes paid under AAA make it an inadequate remedy, totally lacking in due process of law. It is but a scheme on the part of the Government to get and keep unconstitutional exactions under AAA in fraud of the rights of the taxpayer.

For years there has existed with respect to federal taxation a system of collection, which came to be embodied in the well-known Secs. 3220, 3224, 3226 and 3228, as amended, of the Revised Statutes, whereby payment of the tax was made and questions with respect to it were judicially ascertained and determined upon a claim for refund filed by the taxpayer. For this purpose these sections provided that: "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court" (Sec. 3224) and that:

> "No suit or proceeding shall be maintained in any court for the recovery of any internal-

> revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenues, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof" (Sec. 3226).

This system of tax collection has been upheld on the "underlying principle" that:

> "Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process if the opportunity given for the ultimate judicial determination of the liability is adequate" (*Phillips* v. *Commissioner,* 283 U. S. at 595-7),

which on the one hand prevented the Government from being embarrassed in its needs for revenue and on the other hand accorded to the taxpayer the due process of law required by the Fifth Amendment (*Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. at 589, and cases cited in Note 19 thereto).

An examination of these sections will show that this system of tax collection met the required conformity to due process of law through the two following essential characteristics:

(1) They have not restricted the taxpayer in the reasons he might urge of fact or law as ground for refund in whole or in part;

(2) They have in no way allowed the United States to retain, in whole or in part, any taxes it had wrong-

fully, in fact or law, exacted, unless the taxpayer had slept on his rights so that they became barred by the statutes of limitation.

Differing radically from these sections and the equitable and constitutional principles on which they have proceeded and been sustained, Sec. 21 (added by Sec. 30 of the 1935 Amendments) for the first time in the history of this country undertakes to impose on this system of tax collection as a component part of AAA limitations by which the Government endeavors to get and keep unconstitutional exactions in the name of taxation under said act. This statement is demonstrated by the following brief analysis of these provisions:

In the first place, Sec. 9(a), both now and heretofore, levies the tax "upon the first domestic processing" and requires that it "shall be paid by the processor". The processor is thereby made the taxpayer. He alone may file claim for refund. There is no provision whereby anyone else may file a claim for refund or whereby the processor may file a claim for anyone else, even though he may refund or give bond to refund to his vendee or passee. *Accordingly, whatever under these limitations a processor may not recover for his own benefit by claim for refund the United States will retain in its Treasury, though unconstitutionally collected.*

In the second place, by Sec. 21(d)(1) there may be no recovery or set-off of "*any* amount of *any* tax, penalty or interest, which accrued before, on or after" the adoption of the 1935 Amendments, *unless* through claim for refund the Commissioner be satisfied, in addition to all other facts, and so certifies of record, that the processor has not, among other things,

"*directly or indirectly* included such amount in the price of the article * * * or passed on *any part* of such amount to the vendee or any other person *in any manner*".*

The Agricultural Adjustment Administration in its Bulletin of August 30th, 1935, entitled "Detailed Outline of AAA Amendments", commenting on Sec. 21(d)(1), says on page 5 that a recovery through claim for refund

> "*will be allowed only* when the plaintiff satisfies the Commissioner of Internal Revenue that he has not (a) included the tax in the price of the article, *or* (*b*) *passed any part of it on to the buyer,* or (c) included any part of it in the charge or fee for processing, or (d) paid a reduced price for the article because of the tax. Provision is made for court review of the Commissioner's determination on the basis of the record made before him."

---

* Sec. 21(d)(1) provides: No recovery, recoupment, set-off, refund or credit shall be made or allowed of, nor shall any counter claim be allowed for, any amount of any tax, penalty, or interest which accrued before, on, or after the date of the adoption of this amendment under this title (including any overpayment of such tax), unless, after a claim has been duly filed, it shall be established, in addition to all other facts required to be established, to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner shall find and declare of record, after due notice by the Commissioner to such claimant and opportunity for hearing, that neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly, included such amount in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount. In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. The provisions of this subsection shall not apply to any refund or credit authorized by subsection (a) or (c) of section 15, section 16, or section 17 of this title, or to any refund or credit to the processor of any tax paid by him with respect to the provisions of section 317 of the Tariff Act of 1930.

We do not see how any other interpretation can be given the provision under the well-known rule that:

> "We must construe the law and interpret the intent and meaning of Congress from the language of the act. The words are to be given their ordinary meaning unless the context shows that they are differently used" (*Child Labor Case*, 259 U. S. at 36).

The words used are all-embracing—as comprehensive as the English language affords—and undoubtedly have, and were intended to have, the following consequences:

(1) The processor may not recover what he has included in the price of the article or passed on to his vendee or any other person, and so the tax to that extent remains in the Treasury of the United States under these provisions, though unconstitutionally collected.

(2) The processor may not recover "*any* amount of *any* tax" if he has "passed on *any part* of such amount" to his vendee or any other person "in any manner". It does not say, as it easily might have, that no recovery may be had of "that portion of any tax" which the Commissioner finds the processor may have passed on. On the contrary, it expressly prohibits the processor from recovering "*any* amount of *any* tax, penalty or interest" unless he satisfies the Commissioner that he has not "directly or indirectly * * * passed on *any part* of *such amount* to the vendee or to any other person in any manner". Words could not be plainer—passing on part forfeits the whole—*else to what purpose were the words "any*

part" used? The "passing on" is treated apparently as a quasi-criminal act and indulgence therein, *to no matter how limited an extent,* exposes him to an escheat of his property.

The history of the Act confirms this construction. It shows (see H. R. Conf. Rep. in Appendix), the House Bill prohibiting all recovery of taxes theretofore paid and not reduced to final judgment, while allowing the recovery of future payments, though collected in the sale, by refunding or obtaining the customer's consent, followed by Amendments in the Senate that relieved past payments of this prohibition, but forbade recovery of what had been included in the price or collected from the producer, except upon refund, with the Amendment as adopted not only totally preventing recovery of what had been "passed" on or back in any manner, though refunded, but also forfeiting the whole for so passing on or back a part, and making the record before the Commissioner the Court record so as to preclude judicial re-examination.

In the third place, as a practical proposition, it will be impossible, except in a most unusual case, for the processor to bear the burden which Sec. 21(d)(1) places on him of satisfying the Commissioner that he has not thus included or passed on the whole or a part of the tax to his vendee or some other person.

These provisions were intended to have this preclusive effect. Congress was actuated by that motive, as witness the history of the act given in the appendix. The broad words "directly or indirectly", "in any manner" compel that result, because they admit of no possible exception and mere failure of the proof to satisfy the Commissioner prevents the processor from recovering, since the burden of proof is on him (*Burnet* v. *Houston,* 283 U. S. at 227-8).

Indeed, going further than ever before, the section requires that the hearing before the Commissioner for this purpose shall by him be "certified and filed as the record in the case, and shall be so considered by the Court"—thus preventing that essential full judicial re-examination heretofore afforded the taxpayer (*U. S.* v. *Jefferson Co.,* 291 U. S. at 397-9).

We are not dealing with a sales tax added to the invoice price, but with a tax on the act of processing, an excise tax, which enters into the cost of the article (*Liggett & M. Co.* v. *U. S.* [C. C. A. 3rd] 77 F. (2d) at 67; *Cornell* v. *Coyne,* 192 U. S. 418) and brings the case squarely within this statement of this Court in *Lash's Products Co.* v. *U. S.* (278 U. S. at 176):

> "The phrase 'passed the tax on' is inaccurate, as obviously the tax is laid and remains on the manufacturer, and on him alone. * * * The purchaser does not pay the tax. He pays, or may pay, the seller more for the goods because of the seller's obligation, but that is all. * * * The price is the total sum paid for the goods. The amount added because of the tax is paid to get the goods and for nothing else. Therefore, it is part of the price * * *."

It needs no elaboration, but only a moment's consideration of the processing of hogs, cattle, rice, wheat, cotton, tobacco, which are bought at such different times and prices, and result in such different products through separation or blending, to make one realize the utter impossibility of satisfying the Commissioner that such a tax on the act of processing has not been included in the price or passed on in some manner.

Take packing for example: the stock has various

qualities, is bought at various times, under various conditions but in a highly competitive market. Therefrom more than 170 different products are derived, by differing processes for differing purposes, but all sold months thereafter in highly competitive markets. Into the manufacture enter products not subject to the processing tax.

Manifestly, whether or not the tax has been passed on must be ascertained with respect to each such sale of each article, and not from the result of the business as a whole, either for a week, a month, or a year. Yet the tax is not upon the selling price, but upon the processing, so that it is not added to the invoice, has no relation to the selling price, but enters into the cost of the various resulting products, as do other taxes, labor, rent, raw material, and overhead. Even with respect to a sales tax, considered in *United States* v. *Jefferson Co.* (291 U. S. 386), there is great difficulty. Though it seemed to this Court in that case, from the nature of the tax, that if the taxpayer has borne the burden "he can readily show it" (291 U. S. at 402), yet thereafter, on substantially the same facts, the Court of Claims denied recovery to the taxpayer (*Jefferson Co.* v. *U. S.,* 10 F. Supp. 950) and the District Court of Connecticut allowed a recovery to the taxpayer (*Am. Chain Co.* v. *Hartford,* 11 F. Supp. 770).

In *Shenandoah Milling Co.* v. *Early,* Paul, *D. J.,* said in his opinion of September 23rd, 1935 (3 U. S. L. W. Index 119):

> "The conditions imposed by the Amendments are practically impossible to perform. Ordinary millers scattered all over the country are buying wheat in surrounding communities at varying prices from day to day. That

> varying price is not reflected in the selling price of the product made from that wheat. That varying price is not reflected and cannot be reflected in the particular product that comes from the wheat, and it would be an impossibility for any miller to produce any records to show that no part of the processing tax paid was reflected in the reduced price to the producer or reflected in an increased price to the consumer. It could not be done."

In *Armour & Co.* v. *Harrison* (N. D. Ill., August 1st, 1935) Barnes, *D. J.*, said: "For the life of me I cannot figure out how a processor, assuming that he sells the pork and sells it for more than the amount of the processing tax, would ever be able to prove he did not pass on the tax."

In *Baltic Mills Co.* v. *Bitgood* (D. C. Conn., August 28th, 1935) Hincks, *D. J.*, said: "If on the other hand the processor, through sales at a legitimate profit, subjects himself to a suspicion that he has passed on the tax, he will be wholly without evidence to prove the contrary. In short, a processor who sells for the best price he can obtain won't know and can't know himself whether he has absorbed the tax or passed it on" (3 U. S. L. W. Index 84).

See, also, opinion of Otis, D. J., in *Larabee Flour Mills Co.* v. *Nee,* of October 3rd, 1935 (3 U. S. L. W. Index 65).

Can the United States thus get and keep invalid tax exactions through the medium of such limitations on the rights and remedies of those whose property will thus be taken?

It seeks to do so on two grounds, which will now

be considered, and can be characterized only as dishonest circumventions of the just constitutional rights of the people.

As the first ground, the Government baldly asserts a superior right to such tax collections, though invalid, as between itself and its citizens. It says:

> "When the tax is paid, it is generally passed on to the first and subsequent purchasers. Since the ultimate consumer is not in a position to recover, should the tax be held unconstitutional, there would be in this instance a receipt by the Government of invalid taxes. * * * As between the Government and a taxpayer or his purchaser, it is equitable for the Government to have the advantage of the tax payment. The situation may perhaps be likened by way of analogy to the doctrine of escheat" (p. 16 of Brief for the Government on Petition of the Rice Millers for certiorari).

So far as equitable considerations are concerned, this argument has been answered by this Court in no uncertain terms by its declaration in *Bull* v. *United States* (295 U. S. at 260-1) that the retention by the United States of taxes wrongfully collected is "against morality and conscience * * * and amounts in law to a fraud on the taxpayer's rights". See, also, *Moore Ice Cream Co.* v. *Rose,* 289 U. S. at 378-9, and *United States* v. *Emery,* 237 U. S. at 32.

Judge Otis said of this contention in his opinion of October 3rd, 1935 in the *Larabee Flour Mills Co.* case (3 U. S. L. W. Index 65):

> "The taxpayer has a right to include the amount to be taxed, or a part of it, in the price of his products even before he has actually paid

> the tax. Also, he can maintain an action in equity to enjoin the collection of the tax without proving that he has not included or will not include it, or a part of it, in the price of the commodities he manufactures. The funds from which he will pay the tax are his funds and not the less so because they may be replenished by the sale of his products to others. He has been damaged when his money has unlawfully been taken from him and not the less so because he may make himself whole through the consummation of some contract not with the wrongdoer, but with some third person."

And Judge Paul said in his opinion of September 3rd, 1935, in the *Shenandoah Milling Co. Case* (3 U. S. L. W. Index 119):

> "The court is not impressed by the argument that the Government should not be compelled to pay the taxpayer anything except what he himself can show he has paid. That position is that the Government wants to keep money it has illegally collected from some one else because that other person can not show where he got it. The equities of the Government are not above the equities of the citizen."

This question was not presented in *White* v. *Stone* (C. C. A. 1st), 78 F. (2d) 136; *Champ Spring Co.* v. *United States* (C. C. A. 8th), 47 F. (2d) 1; *Standard Oil Co.* v. *United States,* 5 F. Supp. 976, which the Government sometimes cites in support of its position. In them the Government was not seeking to retain an invalid tax regardless of the rights of the citizens.

To the extent the whole tax is forfeited for passing on a part, the net result of the limitations is the infliction of a penalty on the processor to the extent

he has not passed on the tax. (*Lipke* v. *Lederer,* 259 U. S. at 561-2; *Regal Drug Corp.* v. *Wardell,* 260 U. S. at 391-2.)

So far as constitutional considerations are concerned, such a position on the part of the Government is a rank perversion of the "underlying principle" upon which the system of tax collection, by payment and claim for refund, has been sustained. For this principle is that the system is a *"mere postponement of the judicial inquiry"* and therefore "not a denial of due process of law, if the opportunity given for the ultimate judicial determination of the liability is adequate" (*Phillips* v. *Commissioner,* 283 U. S. at 596-7). Yet if the limitations be sustained payment is not "a mere postponement of the judicial inquiry" but a deprivation of all right in the taxpayer to question the validity of the tax and merely because, forsooth, he has done the necessary and expected thing, to protect his business, of passing the tax on, although had not the collection system required payment and the Government was proceeding as plaintiff against him for the collection of the tax (which in substance it really is notwithstanding the form of the procedure—see *Bull* v. *United States,* 295 U. S. at 259-60) it could recover only if the tax were validly imposed, without any regard being paid to whether the taxpayer had passed on, or could pass on, the tax.

While the nature of the tax and of the act of processing make it impossible here, as in a great many other cases (see *Indian Motor Cycle Co.* v. *U. S.,* 283 U. S. at 581-2 and notes 1 and 2), for the taxpayer to say with any certainty or definiteness whether he has or has not passed on the tax or any

part thereof, we think we should point out, as a matter of principle, just where the Government's theory will take us. *Rights of the people respecting taxation will indeed be a dead letter if any such doctrine should ever be established as that they could not question the tax if they had passed it on and those who thus bore it could not question the tax because they were not the taxpayers.* That idea is utterly new and correspondingly unjust and a deprivation of property without due process of law—confiscation.

Counsel for the Government cite *United States* v. *Jefferson Co.* (291 U. S. 386) as authority for their position. But it is completely inapposite. It merely held Sec. 424 of the Revenue Act of 1928 not to be a violation of the principle which we invoke, by reason of the simple requirement "that it be shown or made certain that the money when refunded will go to the one who has borne the burden of the illegal tax and therefore is entitled in justice and good conscience to such relief" (291 U. S. at 401-2). The section expressly authorized the plaintiff to recover *the whole amount paid by him to the United States,* not only for himself to the extent he had absorbed or refunded the tax, but also the residue for the benefit of his customer by giving bond for such refunding.* It is

* Sec. 424 provides: No refund shall be made of any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of section 600 of the Revenue Act of 1924, or subdivision (3) of section 900 of the Revenue Act of 1921 or of the Revenue Act of 1918, unless either—(1) Pursuant to a judgment of a court in an action duly begun prior to April 30, 1928; or (2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or (3) The Commissioner certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate re-

a far cry from the equitable provisions of such a section to the limitations of the 1935 Amendments which allow retention of invalid taxes by the United States. The ruling gives no support to such a result, the case did not present that issue.

And of course, the *Jefferson* case had to do with a sales tax added to the invoice at the time of sale of which the vendor was but a collector and paid only as collections were made, while here the tax is on the processing, enters into cost and is paid by the processor regardless of the price or time of his sales, or even of their occurring.

Escheats furnish no analogy. The doctrine of escheat, as now applied, relates only to the definite failure of heirs. There was a time when property became thus forfeited as a penalty for crime; but surely, counsel for the government have no intention of placing a taxpayer in that category! On the contrary the Government is a trustee *ex maleficio,* just as an individual would be (See *United States* v. *State Natl. Bank,* 96 U. S. at 35-6, approved in *Bull* v. *United States,* 295 U. S. at 260-3).

As the second ground, the Government baldly asserts its superiority to the due process clause of the Fifth Amendment. It says:

> "The constitutional basis for such a provision is found in the power of the United States at any time to assert its sovereign right not to

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payment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer, within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after February 28, 1927, was filed before the allowance of the claim by the Commissioner:

be sued and the power of Congress to determine the jurisdiction of the courts" (pp. 22-3 of the Senate Report and 23 of the House Report, accompanying the Bill).

To sustain this argument reference is made by counsel for the Government to the cases (1) holding that Congress may restrict or remove the jurisdiction of the inferior Federal Courts, so far as suits between private litigants are concerned (*Kline* v. *Burke Construction Co.*, 260 U. S. 226, 234) which, of course, are irrelevant and (2) sustaining exertions of the authority of Congress under the Constitution over importations and immigration, and thereby of acts and regulations in respect of duties and customs (*Cary* v. *Curtis*, 3 How. 236; *Head Money Cases*, 112 U. S. at 591-6; *Fong Yue Ting* v. *United States*, 149 U. S. at 714-5) which are entirely inapplicable because of the plenary power of Congress over foreign commerce. See *University of Illinois* v. *United States* (289 U. S. at 58-60) and *Buttfield* v. *Stranahan* (192 U. S. at 492-3), in which latter this Court said:

> "The power to regulate commerce with foreign nations is expressly conferred upon Congress, and being an enumerated power is complete in itself, acknowledging no limitations other than those prescribed in the Constitution. *Lottery Case* 188 U. S. 321, 353-6; *Leisy* v. *Hardin*, 135 U. S. 100, 108. Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power, resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone

> directly by the enactment of embargo statutes, but indirectly as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff legislation, exerted a police power over foreign commerce by provisions which in and of themselves amounted to the assertion of the right to exclude merchandise at discretion."

As a matter of fact, *the sovereignty of the United States is in nowise involved. It cannot assert that status to retain property wrongfully acquired* (*United States* v. *The State National Bank,* 96 U. S. 30, 35-6). *This doctrine was expressly applied by this court in Bull* v. *United States* (295 U. S. at 260-1), *to taxes wrongfully collected,* where it approved for this purpose the cited case and the statement of this court therein that:

> "In these cases, and many others that might be cited, the *rules of law applicable to individuals were applied to the United States.* Here the basis of the liability insisted upon is an implied contract by which they might well become bound in virtue of *their corporate character. Their sovereignty is in nowise involved.*"

But beyond this, such taxation, of course, is subject in all respects to the due process clause of the Fifth Amendment (*Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 589, and cases cited in Note 19 thereto), which for this purpose has the very same meaning as the due process clause in the Fourteenth Amendment (*Heiner* v. *Donnan,* 285 U. S. at 326), thus making applicable the various decisions of this Court with respect to State taxation, so that on the principles here involved they may be likewise cited.

While the form of the remedy accorded the taxpayer may be changed, as was done when the system of tax collection embodied in the Revised Statutes was inaugurated, it must preserve the essential elements of due process of law because the United States cannot, any more than a State, and for the same reason, "make anything due process of law which by its own legislation it chooses to declare such" (*Davidson* v. *Bd. of Administrators,* 96 U. S. at 102).

Heretofore this system of taxation has conformed to this principle because it merely postponed the judicial determination, reserving an adequate remedy for that purpose (*Phillips* v. *Commissioner,* 283 U. S. at 595-7)—a remedy which we have seen paid no attention whatever to whether or not the taxpayer had passed on the tax, but regardless of that fact allowed the taxpayer to urge any point of law or fact in his questioning of the tax and did not allow the United States to retain any part of an invalid tax.

The limitations imposed in this respect by the 1935 Amendments are squarely in conflict with this underlying principle, in that they take away from the taxpayer all remedy to recover payments it may have made, although those payments constitute invalid tax exactions, and thereby work confiscation of its property. This is exactly what the due process clause was intended to prevent. It is a limitation for this purpose on the sovereignty of the United States and thereby forbids acquisition by legislative fiat, else in vain was it included in the Fifth Amendment to the Constitution (*Monongahela Navigation Co.* v. *United States,* 148 U. S. at 336-7).

In *Graham* v. *Goodcell* (282 U. S. at 430-1) this Court said:

"Having reached this conclusion, it is not

necessary to consider the authority of the Congress to withdraw the consent of the United States to be sued. See *United States* v. *Heinszen*, 206 U. S. 391, 51 L. ed. 1106, 27 S. Ct. 742, 11 Ann. Cas. 688, *supra*. *The argument of the government in this respect is not adequate to dispose of the controversy. Some of the present suits were brought against the collector individually and were based upon the right to recover as against him by reason of his illegal acts. Such an action is personal, and not against the United States.* *Sage* v. *United States*, 250 U. S. 33, 37, 63 L. ed. 828, 830, 39 S. Ct. 415; *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1, 4, 5, 66 L. ed. 99, 100, 101, 42 S. Ct. 1. *If the Congress did not have the authority to deal by a curative statute with the taxpayers' asserted substantive right, in the circumstances described, it could not be concluded that the Congress could accomplish the same result by denying to the taxpayers all remedy both as against the United States and also as against the one who committed the wrong.* See *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673, 679, 680, 74 L. ed. 1107, 1112, 1113, 50 S. Ct. 451."

In *Helvering* v. *City Bank Farmers Trust Co.*, decided November 11, 1935—a federal tax case—this Court said:

"The test of validity in respect of due process of law is whether the means adopted is appropriate to the end. A legislative declaration that a status of the taxpayer's creation shall, in the application of the tax, be deemed the equivalent of another status falling normally within the scope of the taxing power, if reasonably requisite to prevent evasion, does not take

> property without due process. But if the means are unnecessary or inappropriate to the proposed end, *are unreasonably harsh or oppressive,* when viewed in the light of the expected benefit, *or arbitrarily ignore recognized rights to enjoy or to convey individual property,* the guarantee of due process is infringed."

In *Ohio Oil Co.* v. *Conway* (279 U. S. at 815) this Court granted an application for an interlocutory injunction with respect to a State tax because:

> "If the tax be paid during the pendency of the suit, and the statute be adjudged invalid by the final decree, the plaintiff will be remediless. The laws of the State afford no remedy whereby restitution of the money so paid may be enforced, even where the payment is under both protest and compulsion."

Other pertinent cases illustrating and upholding the principle involved are: *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. at 233-9; *League* v. *Texas,* 184 U. S. at 158-9; *Ettor* v. *Tacoma,* 228 U. S. at 155-6; *Hebert* v. *Louisiana,* 272 U. S. at 316-7; *Atlantic Co.* v. *Daughton,* 262 U. S. at 426; *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. at 679, 680.

The attempted limitations imposed by the act at bar on the taxpayer's right even go so far as an endeavor to confine his remedy to a determination by the Commissioner of Internal Revenue—a political appointee at the head of the Government's collection bureau, whose status on that account was found to be so entirely out of harmony with such a task, as to demand the creation of the Board of Tax Appeals (see *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. at

721). The requirement of the Act in this respect is not only that the proof shall be to the satisfaction of the Commissioner, which would leave the matter open for complete judicial re-examination,—see *United States* v. *Jefferson Co.* (291 U. S. at 397-9). It goes further, and provides:

> "In any judicial proceeding relating to such claim a transcript of the hearing before the Commissioner shall be duly certified and filed as *the* record in the case, and *shall be so considered by the Court.*"

The intent of this provision to change the judicial re-examination heretofore accorded the taxpayer into a mere judicial review of this record, notwithstanding the constitutional questions involved, is plain and fully declared in the House Conference Report which is given in the appendix and declares that "no trial *de novo* on the facts by the court is provided for * * * nor can judicial proceedings be brought in the absence of the prior administrative hearing and record" and that the "provision applies to suits against the collector as well as against the United States and applies if the issue comes up in connection with any other suit involving the United States or the collector and the claimant."

Manifestly such an administrative official will not attempt to pass on the constitutional questions involved here. He will not allow the taxpayer any recovery for the taxes he may have included or passed on. He should, and probably will, because he will consider himself bound by the terms of the Act, refuse to allow a recovery of any tax where part of it has been passed on. And under the circumstances he will certainly resolve against the taxpayer any doubt as

to such inclusion or passing on, which doubt, as we have seen, the record may be expected to provide, because of the nature of the tax and the businesses involved. It is clear, therefore, from these considerations, that the claim for refund under these limitations does not furnish that plain, practical, efficient procedure necessary to constitute an adequate remedy at law (*Boyce's Executors* v. *Grundy,* 3 Pet. at 215; *Walla Walla* v. *Walla Walla Water Co.,* 172 U. S. at 12; *Davis* v. *Wakelee,* 156 U. S. at 688; *Union P. R. Co.* v. *Weld,* 247 U. S. at 285-6).

But beyond this, the substitution of a review of the record made before the Commissioner for the judicial re-examination heretofore accorded the taxpayer is, in substance, a negation of that judicial ascertainment and determination which the due process clause affords and which has been sedulously safeguarded by this Court under a variety of circumstances:

One set of such circumstances is the underlying principle upon which we have seen the system of collection by payment and claim for refund has been sustained (*Phillips* v. *Commissioner,* 283 U. S. at 585-9).

Another set of circumstances is the Longshoremen's and Workers' Act and its fixing of compensation (*Crowell* v. *Benson,* 285 U. S. at 45-9).

Another set of such circumstances is the decisions of this Court with respect to rates fixed by utility commissions for public utilities (*Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. at 227-8; *State Corporation Comm.* v. *Wichita Gas Co.,* 290 U. S. at 569).

The Courts have exercised such right of ascertainment and determination with respect to such admin-

istrative tribunals as the Federal Trade Commission and the Board of Tax Appeals. See: *Fed. Trade Comm.* v. *Curtis Pub. Co.*, 260 U. S. at 580; *Fed. Trade Comm.* v. *Eastman Co.*, 274 U. S. at 619; and *Helvering* v. *Taylor*, 293 U. S. at 515-6.

The reason, of course, is that no record before an administrative official or tribunal can be binding on the judiciary so as to prevent it from performing its constitutional duty of ascertaining and determining for itself whether or not the citizen is being accorded his constitutional rights in a constitutional manner (*Truax* v. *Corrigan*, 257 U. S. at 324-5).

A most fitting commentary on what the Government is attempting through these limitations, and conclusive here, are the well-known words of Mr. Justice Davis in *Ex parte Milligan* (4 Wall. at 120-1) with respect to the principles embodied in the first ten Amendments:

> "Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are *now*, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, *and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law.* The history of the world had taught them that what was done in the past might be attempted in the future. *The Constitution of the United States is a law for rulers and people, equally in war and in peace, and*

covers with the shield of its protection all classes of men, at all times, and under all circumstances."

IV.

The circumstances entitle the processors to injunctive relief in equity.

In *Miller* v. *Standard Nut Margarine Co.* (284 U. S. at 509-11) this Court very fully considered this subject and concluded:

> "Independently of, and in cases arising prior to the enactment of the provision (Act of March 2, 1867, 14 Stat. at L. 475, chap. 169) which became Rev. Stat. Sec. 3224, U. S. C. title 26, Sec. 154, this court in harmony with the rule generally followed in courts of equity held that a suit will not lie to restrain the collection of a tax upon the sole ground of its illegality. The principal reason is that, as courts are without authority to apportion or equalize taxes or to make assessments, such suits would enable those liable for taxes in some amount to delay payment or possibly to escape their lawful burden and so to interfere with and thwart the collection of revenues for the support of the government.
>
> "And this court likewise recognizes the rule that, in cases where complainant shows that *in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence,* a suit may be maintained to enjoin the collector, *Dows* v. *Chicago,* 11 Wall. 108, 20 L. ed. 65; *Hannewinkle* v. *Georgetown,* 15 Wall.

547, 21 L. ed. 231; *State R. Tax Cases,* 92 U. S. 575, 614, 23 L. ed. 669, 673.

"*Section 3224 is declaratory of the principle first mentioned and is to be construed as near as may be in harmony with it and the reasons upon which it rests. Cumberland Teleph. & Teleg. Co.* v. *Kelly,* 87 C. C. A. 268, 160 Fed. 316, 321, 15 Ann. Cas. 1210; *Baker* v. *Baker,* 13 Cal. 87, 95; *Bradley* v. *People,* 8 Colo. 599, 604, 9 Pac. 783; 2 Lewis's Sutherland, Stat. Constr. 2nd ed. Sec. 454. *The section does not refer specifically to the rule applicable to cases involving exceptional circumstances. The general words employed are not sufficient, and it would require specific language undoubtedly disclosing that purpose, to warrant the inference that Congress intended to abrogate that salutary and well established rule.*

"This court has given effect to Sec. 3224 in a number of cases. *Snyder* v. *Marks,* 109 U. S. 189, 191, 27 L. ed. 901, 902, 3 S. Ct. 157; *Dodge* v. *Osborn,* 240 U. S. 118, 121, 60 L. ed. 557, 559, 36 S. Ct. 275; *Dodge* v. *Brady,* 240 U. S. 122, 60 L. ed. 560, 36 Su. Ct. 277. It has never held the rule to be absolute, but has repeatedly indicated that extraordinary and exceptional circumstances render its provisions inapplicable. *Hill* v. *Wallace,* 259 U. S. 44, 62, 66 L. ed. 822, 827, 42 S. Ct. 453; *Dodge* v. *Osborn, supra* (240 U. S. 121, 60 L. ed. 559, 36 S. Ct. 275); *Dodge* v. *Brady,* 240 U. S. 122, 60 L. ed. 560, 36 S. Ct. 277, *supra. Cf. Graham* v. *DuPont,* 262 U. S. 234, 257, 67 L. ed. 965, 968, 43 S. Ct. 567; *Brushaber* v. *Union P. R. Co.,* 240 U. S. 1, 60 L. ed. 493, L. R. A. 1917D, 414, 36 S. Ct. 236, Ann. Cas. 1917B, 713."

We call particular attention to the portions we have italicized. For, just like Sec. 3224, these AAA amendments—Secs. 21(a), (d), (e), (f) and (g)—contain no reference specifically "to the rule applicable to cases involving exceptional circumstances" and therefore, under the quoted decisions, the general words employed in these amendments cannot be held "to warrant the inference that Congress intended to abrogate" the jurisdiction of equity in these exceptional cases, to warrant which "it would require specific language undoubtedly disclosing that purpose". This is all the more true since the amendments were passed in the light of the decision of the Supreme Court on this subject in the quoted case.*

Applying these principles, injunctive relief should be afforded here on the following grounds:

In the first place, to the extent these limitations prevent the processor from recovering "any amount of any tax", though absorbed by him, by reason of having passed on "any part of such amount", they inflict a penalty, to which Sec. 3224 and the like provisions of these limitations are inapplicable, and injunctive relief may be granted under *Lipke* v. *Lederer,* 259 U. S. 557, and *Regal Drug Corp.* v. *Wardell,* 260 U. S. 386.

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* Only Sec. 21(a) is relevant, and it simply provides: No suit, action, or proceeding (including probate, administration, receivership, and bankruptcy proceedings) shall be brought or maintained in any court if such suit, action, or proceeding is for the purpose or has the effect (1) of preventing or restraining the assessment or collection of any tax imposed or the amount of any penalty or interest accrued under this title on or after the date of the adoption of this amendment, or (2) of obtaining a declaratory judgment under the Federal Declaratory Judgments Act in connection with any such tax or such amount of any such interest or penalty. In probate, administration, receivership, bankruptcy, or other similar proceedings, the claim of the United States for any such tax or such amount of any such interest or penalty, in the amount assessed by the Commissioner of Internal Revenue, shall be allowed and ordered to be paid, but the right to claim the refund or credit thereof and to maintain such claim pursuant to the applicable provisions of law, including subsection (d) of this section, may be reserved in the court's order.

In the second place, these limitations of the 1935 Amendments on the claim for refund make it an utterly inadequate legal remedy, entirely lacking in due process of law. The direct and irreparable injury thereby done the processors already appears and is shown in detail hereinafter. This, of course, furnishes an established ground of equity jurisdiction. The reasons and authorities are those already given.

Squarely in point is *Union P. R. Co.* v. *Weld* (247 U. S. at 285-6) where this Court held:

> "And if the section has been so qualified and modified that the continued existence of the right originally conferred on the taxpayer is involved in uncertainty, an essential element of the requisite remedy at law is wanting; for, as this court has said: 'It is a settled principle of equity jurisprudence that, if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit. * * * Where equity can give relief, plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law.' *Davis* v. *Wakelee,* 156 U. S. 680, 688."

This is a leading authority which has been often followed. See: *Atlantic Co.* v. *Daughton,* 262 U. S. at 426; *Dawson* v. *Kentucky Co.,* 255 U. S. at 295-6; *Wallace* v. *Hines,* 253 U. S. at 67-8; and *Henrietta Mills* v. *Rutherford County,* 281 U. S. at 126-7.

Here the limitations of the 1935 Amendments have so qualified and modified the right originally conferred on the taxpayer by the well-known system of tax collection embodied in the Revised Statutes, and required by the Fifth Amendment, as that (even if passing on part does not forfeit the whole), in case

the processor is not able to bear the burden, impracticable by reason of the nature of the tax and the processing, of proving he has not included the tax in the price of the article or passed it on to his vendee, he is utterly without remedy to challenge or recover and no other one is accorded such remedy, although some other one has certainly borne the tax, if not the processor. In other words, there is total lack of remedy—pure confiscation—an utter disregard of the Fifth Amendment and the cases construing and applying it. See: *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. at 679-82; *Graham* v. *Goodcell,* 282 U. S. at 430-1; *Phillips* v. *Commissioner,* 283 U. S. at 595-7; *Chicago Co.* v. *Chicago,* 166 U. S. at 235-7; *Ettor* v. *Tacoma,* 228 U. S. at 155; *Davidson* v. *Bd. of Administrators,* 96 U. S. at 102.

Indeed so far does the claim for refund under these limitations fall short of being an adequate remedy, conforming to due process of law, that it will have the consequence of perpetrating a fraud on the legal rights of the taxpayer which might in and of itself well afford sufficient ground for the injunctive relief of a Court of Equity.

Of course, legal fraud, actual or constructive, furnishes ample ground for such relief. This Court said in *Atkins* v. *Dick* (14 Pet. at 119):

> "If there be any one ground upon which a court of equity affords relief with more unvarying uniformity than on any other, it is an allegation of fraud, whether proven or admitted."

For application of this doctrine to taxation, see *Raymond* v. *Chicago Co.,* 207 U. S. at 37; *Wilson* v. *Illinois S. R. Co.,* 263 U. S. at 577; *Bohler* v. *Callaway,* 267 U. S. at 489.

That such consequence would result is manifest. This Court has authoritatively declared that retention by the United States of taxes wrongfully exacted *"amounts in law to a fraud on the taxpayer's rights"* and that it occupies thereto the same relation as an *individual with "its sovereignty in nowise involved"* (*Bull* v. *U. S.*, 259 U. S. at 260-1; *U. S.* v. *State Natl. Bank,* 96 U. S. at 35-6). Yet the purpose of these limitations is to accomplish that precise result through securing payment of the tax and then claiming that though the exaction be invalid the processor may not complain because he has passed on to his customer, and the customer may not complain because he is not the taxpayer.

Such is the *device,* enacted in these limitations, by which the United States is seeking to get and keep the property of its citizens, notwithstanding the invalidity of its exactions. There is no question that such is the scheme, the design, the intent, of these limitations. Their terms admit of no other conclusion. Indeed, counsel for the Government, in their brief in opposition to a petition for certiorari in these cases, went so far, as we have seen, as to contend that though the tax exactions be invalid "as between the Government and a taxpayer or his purchaser it is equitable for the Government to have the advantage of the tax payment".

Will the Government be allowed to force payments to itself under such a scheme, for such a purpose, with such a result? Can such technical considerations, so lacking in administrative justice, circumvent the constitutional rights of the citizens and accomplish such an object?

That is the essential question here—not who may eventually bear the burden of the illegal exactions. As well said by Judges Paul and Otis in their deci-

sions in the *Shenandoah* and *Larabee* cases from which we have already quoted, the Government has no right to "keep money it has illegally collected from someone else because that other person cannot show where he got it"; the taxpayer has been "damaged when his money has unlawfully been taken from him, and not the less so because he may make himself whole through the consummation of some contract, not with the wrongdoer, but with some third person".

Liability for the tax is upon the processor. It is his business that suffers from its burdens and risk. How he worked out the situation under the demoralized competitive conditions, in order to survive, is a matter of private concern between him and his customers (*Wayne County Produce Co.* v. *Duffy-Mott Co.*, 244 N. Y. 351), totally irrelevant to the essential question here, which is, we repeat, will the United States be allowed to get and keep invalid taxes in such a manner and for such a purpose. The circumstances are such as to forbid any exercise of the power of a court of equity to impose terms on the relief it grants (*Central K. N. G. Co.* v. *Railroad Commission*, 290 U. S. at 271). Had the Act expressly authorized the passing on, the processors could still maintain this suit and question the validity of the tax under the precedent of the suits by national banks for a like purpose as to the taxes on their shares which fall on their shareholders by reason of the liability for the tax, under pain of penalty and interest if the liability is not discharged.*

* See: *Cummings* v. *Merchants Natl. Bank*, 101 U. S. 153, 156; *Pelton* v. *The Bank*, 101 U. S. 143; *Hills* v. *Bank*, 105 U. S. 319; *Hannan* v. *First Natl. Bank* (C. C. A. 8th), 269 Fed. 527, 530; *Eddy* v. *First Natl. Bank* (C. C. A. 8th), 275 Fed. 550; *Crawford County Bank* v. *Crawford County* (C. C. A. 8th), 66 F. (2d) 971; *Toy Natl. Bank* v. *Nelson*, 38 F. (2d) 261; *Fourth Atlantic Bank* v. *City of Boston*, (C. C. A. 1st), 300 Fed. 29; and *McFarland* v. *Central Natl. Bank* (C. C. A. 8th), 26 F. (2d) 890, 891. State cases to the same effect are: *Mercantile Natl. Bank* v. *The Mayor*, 172 N. Y. 35, 44; *People ex rel. American E. N. Bank* v. *Purdy*, 196 N. Y. 270, 275-6, and cases cited; reaffirmed in 199 N. Y. 51; and *Second Natl. Bank* v. *City of New York*, 213 N. Y. 457, 462.

In the third place, the most unusual situation presents exceptional and extraordinary circumstances which entitle the processor to injunctive relief. There is the real magnitude of the constitutional questions involved, which in and of themselves are sufficient for this purpose (*Borden's Co.* v. *Baldwin,* 293 U. S. 194) since they have been declared by this Court to be as far-reaching and of as large importance as any that could be presented to it (*Fiela* v. *Clark,* 143 U. S. at 695). There is the impracticability of proving the required negative to the satisfaction of the Commissioner and meanwhile we have the tremendous financial consequences involved and the long, troublesome and expensive course which the processors of this country will have to pursue, should they be required to file claims for refund and seek to prove the extent to which they have or have not included or passed on the tax, or any part thereof, with the scope allowed to the Commissioner of Internal Revenue to examine their officers, employees and records for that purpose, and the burden on business from the uncertainty meanwhile. Why should these momentous issues be kept hanging like an incubus over business by confining processors to such a course, when without it, we think in obviation of it, they may be determined by a single suit in equity in a speedy and efficient manner? These circumstances, it seems to us, clearly bring such a suit within the principles of *Boyce's Executors* v. *Grundy* (3 Pet. at 215), as well as *Walla Walla* v. *Walla Walla Water Co.* (172 U. S. at 12), *Davis* v. *Wakelee* (156 U. S. at 688); *Union P. R. Co.* v. *Weld* (247 U. S. at 285-6); *Raymond* v. *Chicago Co.,* 207 U. S. 20, and *Wilson* v. *Illinois Co.,* 263 U. S. 574, which held that:

> "It is not enough that there is a remedy at law; it must be plain and adequate or, in other words, *as practical and as efficient to the ends*

of justice and its prompt administration as the remedy in equity."

It is of the essence that such momentous questions, having such far-reaching consequences, whose existence occasions such damage, doubt and vexation, should be disposed of in the most expeditious way consistent with orderly procedure; and here that, by far, is furnished through a suit in equity rather than by claims for refund from every aspect.

In the fourth place, and closely allied to the ground we have just stated, there is the multiplicity of claims for refund by processors, and actions based thereon, which a consideration and determination of these important questions in a single suit in equity will prevent. Already over a thousand suits in equity have been brought to enjoin the collection of the processing taxes. Processing taxes must be paid monthly (see provisions of Sec. 600 of the Revenue Act of 1926 and of Sec. 626 of the Revenue Act of 1932, made applicable by Sec. 19(b) of the AAA) by each of the processors of various agricultural commodities. One can readily realize, therefore, how many different claims for refund will have to be filed and considered, and consequent actions brought, with the delay, trouble and cost occasioned, since as respects each monthly payment by each processor it will be the duty of the Commissioner of Internal Revenue under these limitations to ascertain and decide whether any part of the tax so paid has been passed on by the processor.

On the other hand, the questions presented by a suit in equity by any processor, namely, the constitutionality of the AAA, as respects the imposition of the tax and the use of the revenues thereby raised, may be heard and determined in one case for all cases that might arise under the Act and amendments, without

any ascertainment as to whether or not the tax has been passed on in a particular case.

That prevention of a multiplicity of suits is a ground of equity jurisdiction was recognized in *Dows* v. *Chicago*, 11 Wall. 108, cited with approval in *Miller* v. *Standard Nut Margarine Co., supra.*

What constitutes a multiplicity of suits is illustrated by cases collected in a note at 76 L. ed. 455 to *Matthews* v. *Rodgers,* 284 U. S. 521. It shows by citation of a great many authorities that equity will take jurisdiction in suits to enjoin taxation when so doing will (1) prevent similar suits by a great many individuals likewise situated which present the same issues, as in *Hill* v. *Wallace* (259 U. S. at 62) where the suit in equity prevented a great many like suits by the various members of the Chicago Board of Trade, or (2) prevent a great number of suits by the same person that present the same issue (*Lee* v. *Bickle,* 292 U. S. 415) as illustrated in the case of P. Lorillard Company, which would have to file a claim for refund not only for each monthly payment, but also with different Collectors, due to location of its factories, in Jersey City, New Jersey, Richmond, Virginia, Cincinnati, Ohio. See, also: *Hale* v. *Allinson,* 188 U. S. at 72-9; *First State Bank* v. *Chicago, R. & I. R. Co.* (C. C. A. 8th), 63 F. (2d) 585. In the former this Court discussed the subject at length and held it must rest upon "the reasonable convenience of the remedy, its effectiveness, and the inadequacy of the remedy at law", as to which each case must be

> "decided upon its own merits and upon a survey of the real and substantial convenience of all parties, the adequacy of the legal remedy,

> the situations of the different parties, the points to be contested, and the result which would follow if jurisdiction should be assumed or denied * * * and whether within reasonable and fair grounds the suit is calculated to be in truth one which will practically prevent a multiplicity of litigation and will be an actual convenience to all parties and will not unreasonably overlook or obstruct the material interest of any."

See also *Raymond* v. *Chicago Co.,* 207 U. S. at 38-40; and *Wilson* v. *Illinois Co.,* 263 U. S. at 577.

In the fifth place, these limitations would not only prevent any *affirmative* recovery, but even preclude the use of these taxes, thus illegally collected and retained, as a *defense* by way of set-off, recoupment or counterclaim in proceedings by the Government to collect further taxes from the taxpayer.

A proceeding by the United States to collect a tax, though summary in form, is the equivalent, in substance, of a proceeding in Court for the same purpose, and therefore gives full right to the taxpayer by way of counterclaim to assert as a defense thereto any amounts due by the Government to the taxpayer. See *Bull* v. *U. S.* (295 U. S. at 260-2) which, citing *U. S.* v. *State Nat'l Bank* (96 U. S. at 35-6), *U. S.* v. *Ringgold* (8 Pet. at 163) and *The Siren* (7 Wall. at 154-5) also holds that no consent of the Government is needed in order to use such set-off or counterclaim as a defense.

Unquestionably, therefore, such preclusion brings into play the well-known ground of equity jurisdiction, namely, that of enabling the defendant to make such defenses. This is thoroughly established in

Scott v. *Armstrong* (146 U. S. at 507-8), where it was said that "courts of equity from a very early day were accustomed to grant relief in that regard, independently as well as in aid of statutes upon the subject"; and in *North Chicago Co.* v. *St. Louis Co.* (152 U. S. at 615-7), where the Court said:

> "Cross-demands and counterclaims, whether arising out of the same or wholly disconnected transactions, and whether liquidated or unliquidated, may be enforced by way of set-off whenever the circumstances are such as to warrant the interference of equity to prevent wrong and injustice."

V.

Processors may question the constitutionality of AAA.

Relying mainly on *Massachusetts* v. *Mellon* (262 U. S. at 486-8), it is claimed on behalf of the Government that processors may not question the use of the revenue powers in AAA, notwithstanding the burden it places on their businesses and the disposition it makes of their property, although undoubtedly were a State tax involved the processors could successfully maintain a suit in equity for the prevention of such an invasion of property rights.

But the Mellon case is an authority against, not for, this contention. Nor do we see how the contention can be sustained either on principle or authority. For if it be sustained, in vain have any limitations been imposed by the Constitution or its Amendments with respect to the revenue powers of Congress.

In the *Mellon* case the Court said the contention of the taxpayer, Frothingham,

> "though not clear, seems to be that the *effect of the appropriations* complained of will be to increase the burden of *future* taxation and *thereby* take her property without due process of law."

It was of this narrow, really fantastic, issue that the Court used the expressions, so much relied on by the Government:

> "The administration of any statute likely to produce *additional* taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public, and not of individual, concern. If one taxpayer may champion and litigate *such* a cause, then every other taxpayer may do the same, not only in respect of the statute here under review, but also in respect of every other appropriation act and statute whose administration requires the outlay of public money and whose validity may be questioned. * * *
>
> "We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. *That question must be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue is made to rest upon such an act.* Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. * * * The party who invokes the power must be able to show not only that the statute is invalid, but that he *has sustained or is immediately in danger of sustaining some direct injury* as a result of its enforcement, and not merely that he suffers in some *indefinite* way in common with people generally."

And it was this issue that made pertinent the Court's distinction between enjoining local taxation where

> "The interest of a taxpayer of a municipality in the application of its money is direct and immediate",

and enjoining Federal taxation where

> "The relation of a taxpayer of the United States to the Federal Government is very different. His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively *minute and indeterminable;* and the effect upon *future* taxation of any payment out of the funds is so *remote, fluctuating and uncertain* that no basis is afforded for an appeal to the preventive powers of a court of equity."

Plainly, therefore, this case is squarely opposed to a doctrine of the breadth which the Government would deduce from it. It expressly said that the question would be considered "when the justification for some direct injury suffered or threatened presenting a justiciable issue is made to rest upon such an act".

Just as plainly such a "direct injury" presenting "a justiciable issue" and resting upon AAA is presented in the instant cases. Here the interest of the processor and the injury he may suffer are not "future", nor "minute and indeterminable", nor "remote, fluctuating and uncertain". On the contrary, "he has sustained" and "is immediately in danger of sustaining some direct injury as a result" of AAA's enforcement, for the effect on him of both the imposition of the tax and the use of the proceeds

thereof is direct and immediate, present and definite, large and embarrassing. Stated more in detail:

(1) There is the burden of the tax itself, which is a direct and immediate charge on the processor and his business, since by Sec. 9(a) of the Act the tax is levied upon "the first domestic processing" and is required to be "paid by the processor". According to the recent report of the Agricultural Adjustment Administration, its distributions, out of funds derived from the proceeds of these taxes, during the single fiscal year ending June 30th, 1935, totalled the tremendous sum of $807,868,134.47, made up as follows:

For Cotton,	$116,195,930.56
" Wheat,	98,223,175.49
" Tobacco,	28,767,914.02
" Corn—Hogs,	302,407,647.62
" Sugar,	17,844,145.08
" Surpluses,	12,591,001.49
" Drouth—Disease,	148,520,819.96
" Trust Funds,	13,704,070.23
" Tax Refunds,	30,292,782,89
" Expenses,	39,320,647.13

(2) There is the burden from the increase in the cost to the processor of the products he processes, through the use of the tax funds, again tremendous, and again direct and immediate in its effect on his business. Such increase is the real object of AAA and the proceeds of these taxes are by its terms explicitly set aside for purchase from the farmer of crop curtailment, and submission to Federal regulation of their intrastate activities, in order to produce a scarcity of agricultural commodities and thereby create a demand for them which will increase the price therefor. Thus, it is that we have had the plowing up of cotton and the killing of pigs, which

has changed our land from one of plenty to one of scarcity, and even caused us to have to import for the use of our people necessaries which we used to raise in abundance.

There is no gainsaying that under existing circumstances, indeed, under any circumstances, both these taxes and these increases in prices are huge and embarrassing burdens on the processors.

If the processor passes these burdens on, he must thereby increase his price and so encounter consumer resistance, if not resentment, with consequent curtailment in and serious damage to his business. The papers are daily telling us the effects of such rise in prices on the business of processors, as, for instance, the boycotting of meat shops and denunciation of the packers by reason of the rise in price of meats and the curtailing and even closing down of textile mills, as in New England, due to lack of demands for those products.

If the processor absorbs these burdens he thereby takes upon himself an enormous financial load, which is crushing many concerns and from which claim for refund affords no adequate relief at all. Such a claim can afford no relief to the processor as respects this increase in the cost of his materials through the unconstitutional taking of the property of the processor and bestowing it upon the farmer in the purchase of curtailment to occasion these higher prices; that unconstitutional use and effect can be reached and remedied only by a suit in equity. Heretofore a claim for refund might have secured recovery of all taxes paid, with interest, if the law were held unconstitutional. Now this claim for refund has been so circumscribed by these recent amendments of AAA as to make that course of procedure futile to a processor.

These facts, of course, show the processors will be not only directly but irreparably injured. See *Foster-Fountain P. Co.* v. *Haydel,* 278 U. S. 1; *Ohio Oil Co.* v. *Conway,* 279 U. S. 813; and *Champlin R. Co.* v. *Corporation Commission,* 286 U. S. 210.

The exertion of the revenue powers in AAA are expressly for the purpose of thus using the property of one set of private citizens to purchase from another set of private citizens, for their personal profit, Federal control of an intrastate activity. In other words, by this so-called taxation the property of the processors is bestowed upon the farmers as a consideration for their making contracts with the Secretary of Agriculture, whereby through him the Federal Government controls their growing of crops.

Heretofore Sec. 12(b) appropriated "*the proceeds derived* from all taxes imposed under this title" for "administrative expenses, rental and benefit payments, and refunds on taxes", whereas now, as amended by Sec. 3 of the 1935 Amendments, this section appropriates for those purposes "a sum equal to *the proceeds derived* from all taxes imposed under this title". But no difference in substance arises from this difference in language, because "no mere exercise of the art of lexicography can alter the essential nature of an act or thing" (*U. S.* v. *La Franca,* 282 U. S. at 572). The tax is to supply funds for the purposes of the act. Each wording appropriates only "the proceeds derived" from the taxes as, when and to the extent "derived" therefrom. There can be no "sum equal to the proceeds derived" from the taxes imposed unless and until those proceeds have been thus derived; the derivation is a condition precedent to the effectiveness of the appropriation.

Furthermore, by Sec. 9(a), as respects each basic agricultural commodity, the processing tax comes into effect only when the Secretary of Agriculture determines to make rental or benefit payments under Sec. 8, and such tax terminates when the Secretary determines that such rental or benefit payments shall cease. Accordingly, AAA makes the rental or benefit payments as respects each commodity the condition precedent of the existence of the tax. The payments and the taxes are linked together as cause and effect, neither exists without the other, and it is therefore impossible to say that the taxes are not imposed for the specific purpose of defraying these rental or benefit payments. In *Worthen Co.* v. *Kavanagh* (295 U. S. at 60), this Court said, with respect to kindred constitutional questions, that "what controls our judgment at such times is the underlying reality rather than the form or label". See, also *Mugler* v. *Kansas*, 123 U. S. at 661.

In *Gebelein* v. *Milbourne* (12 F. Supp. at 111), in granting temporary injunctions at the instance of processors, Chesnut, *D. J.*, said:

> "In form the tax is not open to objection because it is expressly stated that it is levied to provide funds for the purposes of government and the proceeds of the tax are to be paid into the national treasury. It would, however, be a narrow view to stop here in the inquiry because it clearly enough appears in the Act as a whole that the taxes are substantially earmarked and dedicated as a fund from which to defray the rental or benefit payments made to farmers as producers.";

and in a supplemental opinion on a motion to dissolve these injunctions after the 1935 Amendments he adhered to his former opinion (12 F. Supp. at 121-6).

Similarly, Otis, *D. J.*, said in his opinion in the *Larabee Flour Mills Case*:

> "The taxes were levied for the purpose of procuring funds with which to pay benefits to farmers. If there are other purposes they are incidental. If there is camouflage it does not conceal. Let it be said plainly, it is unquestionably the truth, the Agricultural Adjustment Act imposes taxes on processors to obtain money with which to pay so-called benefits to farmers, —to compensate them for wheat they have not sowed, for corn they have not planted, for pigs that never lived to squeal. The theory is that the great farming class, hitherto 'forgotten', will be so brought (or perhaps restored) to a more abundant life" (U. S. L. W. Index 65).

Thereby this case is brought within *Railroad Retirement Board* v. *Alton R. Co.*, where this Court in an opinion by Mr. Justice Roberts held the Railroad Retirement Act unconstitutional and granted an injunction against the tax because, among other things, it "denies due process of law by taking the property of one and bestowing it upon another" (295 U. S. at 350).

For the very same reason on principle injunctive relief may be had because Congress is likewise exceeding its authority by using its revenue powers to control intrastate affairs (*Linder* v. *U. S.*, 268 U. S. at 17-8; *Gibbons* v. *Ogden*, 9 Wheat. at 199; *Passenger Cases*, 7 How. at 446-7; *Veazie Bank* v. *Fenno*, 8 Wall. at 541; *Child Labor Case*, 259 U. S. at 38-40).

In *Hill* v. *Wallace* (259 U. S. at 62), this Court said:

> "Were this a state act, injunction would cer-

> tainly issue against such officers under the decisions in *Ex parte Young,* 209 U. S. 123; *Ohio Tax Cases,* 232 U. S. 576, 587; *McFarland* v. *American Sugar Refining Co.,* 241 U. S. 79, 82";

and it allowed the suit to be maintained and in it enjoined a Federal tax as unconstitutional because, *just as is the case here*:

> "It is impossible to escape the conviction, from a full reading of this law, that it was enacted for the purpose of regulating the conduct of business of boards of trade through supervision of the Secretary of Agriculture and the use of an administrative tribunal consisting of that Secretary, the Secretary of Commerce, and the Attorney General" (p. 66);

and thereby it undertook to regulate intrastate affairs which were beyond the power of Congress.

In *Miller* v. *Standard N. M. Co.,* 284 U. S. at 509-11, it was held an injunction should be awarded because the illegality was not "in the amount of the tax" but the "tax could by no legal possibility have been assessed against respondent". By parity of reason it is likewise with a tax forbidden by the constitution under the circumstances existing here. To this effect is *Ogden City* v. *Armstrong,* 168 U. S. at 240-1.

In *Nashville etc. Co.* v. *Wallace* (288 U. S. at 261-2), it was held a taxpayer could call in question, as violative of the Commerce Clause and 14th Amendment, a tax on the storage of gasoline, because "unlike" the *Mellon* case,

> "Valuable legal rights, asserted by the complainant and threatened with imminent invasion by appellees, will be directly affected to a speci-

fic and substantial degree by the decision of the question of law."

Other cases as to state taxes are: *Re Tyler,* 149 U. S. 164; *Fargo* v. *Hart,* 193 U. S. 490; *Raymond* v. *Chicago Co.,* 207 U. S. 20; *Wallace* v. *Hines,* 253 U. S. 66; *Dawson* v. *Kentucky Co.,* 255 U. S. 288; *Stewart Dry Goods Co.* v. *Lewis,* 287 U. S. 9; *Greene* v. *Louisville & Co.,* 244 U. S. 499; *Wilson* v. *The Illinois Ry.,* 263 U. S. 574.

While thus a decision of the question is unnecessary to awarding injunctive relief in this case, nevertheless we should add that we can perceive no valid reason, on principle or authority, why unconstitutional appropriations out of general federal funds may not be challenged and prevented by those contributing to those funds.

By some it is said that the courts may not, cannot properly, distinguish between a public and a private purpose. So says Prof. Corwin in Harvard Law Review (1923) XXXVI. *But this entirely overlooks the decisive fact that this court does decide for itself just this very question, and by the very test we think should be applied here.* Eminent domain is one instance (*U. S.* v. *Gettysburg Co.,* 160 U. S. at 681). Another instance is use of municipal funds (*Crampton* v. *Zabriskie,* 101 U. S. at 609). So also with respect to the use of state funds (*Topeka Case,* 20 Wall. at 662-7), notwithstanding "the scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts and a proper reluctance to interfere by injunction with their fiscal operations" (*Matthews* v. *Rodgers,* 284 U. S. at 525-6). The question is no more delicate than what directly affects interstate commerce. Due process of law has never been defined.

This Court said in *Olcott* v. *Supervisors* (16 Wall. at 690):

> "Now whether a use is public or private is not a question of constitutional construction. It is a question of general law. It has as much reference to the constitution of any other state as it has to the state of Wisconsin. Its solution must be sought not in the decisions of any single state tribunal but in general principles common to all courts. *The nature of taxation, and what uses are public and what are private, and the extent of unrestricted legislative power, are matters which, like questions of commercial law, no state court can conclusively determine for us.*"

Such use for private purposes is opposed alike to the principles of our state and national governments (*Topeka Case,* 20 Wall. at 662; *Calder* v. *Bull,* 3 Dall. at 388-9; *Railroad Retirement Act Case,* 295 U. S. at 350). Such use to control intrastate affairs is also forbidden (*Linder* v. *U. S.,* 268 U. S. at 17-8; *Child Labor Case,* 259 U. S. at 38-9; *Gibbons* v. *Ogden,* 9 Wheat. at 199).

Inescapably presented, therefore, are the alternatives Chief Justice Marshall in *Marbury* v. *Madison* (1 Cr. at 176-7) thus postulated for all time and circumstances:

> "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation."

> "It is a proposition too plain to be contested that the constitution controls any legislative act repugnant to it, or that the legislature may alter the constitution by an ordinary act. *Between these alternatives there is no middle ground.* The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it."

It was said, *arguendo,* in the *Mellon Case* (though not a question therein as the case concerned "future taxation" and so did not present a justiciable issue), that a difference existed between a municipal and a federal taxpayer because the latter's interest in the application of the moneys was not so direct and immediate (262 U. S. at 486-7). If such constitutional questions—of the very utmost import (*Field* v. *Clark*, 143 U. S. at 695)—could ever be resolved on a basis of degree rather than intrinsic propriety, that time definitely has passed. Today the most direct and immediate interest and ominous threat to all is federal taxation and expenditure. Through a claimed unlimited welfare clause and a claimed inability of the federal taxpayer to prevent violations of constitutional restrictions we are face to face with crushing taxes (in billions, not millions), unbalanced budgets, debased dollars, repudiated obligations, inflation, bankruptcy.

"Congress as Santa Claus" (Michie, 1932) by the eminent author, Mr. Charles Warren, tells the story in a compact volume, full of fact and logic, which should be read by all. He speaks with authority by reason of his great and able labors, as shown by his other familiar and valuable works in this field—*and*

draws this very conclusion—the fate of Rome—and he might have added other nations (pp. 144-5).

Warmly espousing the Madison theory, he declares of the Hamilton theory (p. 8) that:

> "The inconsistency of this construction with the general theory of limited powers on which the constitution is based has been frequently pointed out, and never better than by John Randolph Tucker" (Tucker on The Constitution, I, 478, 480);

and adds this important information and opinion (pp. 26-7):

> "It is to be further noted that when President Monroe and Judge Story adopted this theory as to the scope of the General Welfare Clause, Madison's Notes of Debates in the Federal Convention had not yet been published, and all that they knew about the Clause was the meager information to be gained from the Journal of the Convention (published in 1819). They were ignorant, therefore, of the manner in which the words 'and to provide for the common defence and general welfare of the United States' came to be inserted after the words 'to pay the debts' and of the reasons therefor. These reasons are very apparent to one who now reads Madison's Notes: and Judge Story might well have given a different interpretation to the Clause, had he read them." (Citing The Making of the Constitution (1928), by Charles Warren, pp. 464-479; Judge Story's Position on the So-Called General Welfare Clause, by Henry St. George Tucker, see Cong. Record, December 13, 1927.)

Dealing with the "argument of the precedents" he shows that:

> "These three statutes—the Codfisheries Act in 1792, the San Domingo Act in 1794, and the Venezuela Act in 1812—the first, based on the Commerce Clause; the second, on the Debt Paying Clause; and the third, merely on a desire to foster our foreign relations—constitute the sole instances of Congressional donation of Government tax revenues, between the year 1789 and the year 1867—a period of seventy-eight years" (pp. 20-1, 75, 139).

that dispositions of land (pp. 70-2) and internal improvements (pp. 21-5, 86) rested on entirely different powers, and that (pp. 138-40) no money was ever

> "appropriated for relief of private citizens until 1867 when an appropriation was made, defended chiefly under the War powers. It was not until 1874 that relief to flood sufferers was given under a theory of General Welfare. Between 1875 and 1905, a period of thirty years, only seven similar acts were passed based on this power (in 1878, 1882, 1884, 1890, 1897, 1902). It is only within the last twenty-five years, therefore, that the flood of laws bestowing Government alms has deluged our statute books. Moreover, in only one instance—the Maternity Act—has any attempt been made to test the Constitutionality of these laws in the Supreme Court; and in that instance, the Court held that it had no jurisdiction (*Massachusetts* v. *Mellon, Frothingham* v. *Mellon* (1923), 262 U. S. 447). Hence, the precedents are not weighty evidence of Congressional power; for, as the Supreme Court has stated in a recent case, the weight of the 'use of Congressional legislation to support

or change a particular construction of the Constitution by acquiescence' must depend, in part, 'upon the number of instances in the execution of the law in which opportunity for objection in the Courts or elsewhere is afforded'." (*Myers* v. *United States* (1926), 272 U. S. 52, 170-171, per Taft, *C. J.*)"

He further shows that these acts met with constant, at times violent opposition, with numbers of such bills defeated, and others passed by the votes of those who openly admitted their unconstitutionality (pp. 72-91, 100-11). Accordingly, he concludes:

*"In view of these conditions as to Legislative precedents, it seems peculiarly unfortunate that the Supreme Court has never rendered a decision upon two fundamentally important questions which would determine the Constitutionally of such legislation—first, whether the Madison or the Hamilton construction of the General Welfare clause is correct; second, whether legislation for the benefit of favored individuals or classes of individuals is within the meaning of the words 'General Welfare'. And this is the more unfortunate, because the law as to the power of States and municipalities to spend the public moneys has been very clearly laid down by the Supreme Court in several cases, in which it has held that a tax must be for a public purpose, and that taxes levied or bonds issued for the benefit of private individuals are unconstitutional. * * * When the General Welfare Clause is utilized to enable the Federal Government to appropriate money for objects which belong properly to the States, it is not a mere technicality for us to raise the objection that such appropriations are in viola-*

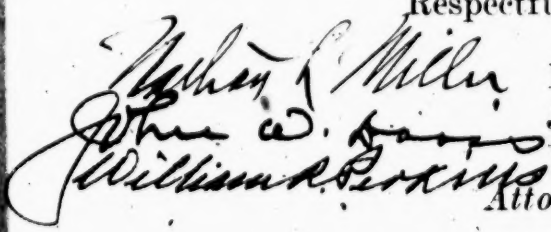
tion of the intent of the Constitution. Such an objection, as the Attorney General of the United States has recently said, 'goes to the very spirit of our Constitutional system, the maintenance of the proper balance between local and National Governments and the preservation of that system of local self-government and responsibility under which we have heretofore prospered' " (pp. 140-1, 143-4).

CONCLUSION.

It is submitted that the AAA is unconstitutional, for the fundamental reasons we have urged; that these reasons go to the very foundation of the Act as it formerly existed and as it now exists after the Amendments of August 24th, 1935; that on account thereof the whole Act should be held totally beyond the powers of Congress and void, with further making of agreements and collection of taxes thereunder barred and all taxes previously collected thereunder refunded with interest.

December 5, 1935.

Respectfully,



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Appendix

Extracts from House Conference Report (No. 1777), pages 31-4, on the limitations proposed by Sec. 27, added by Sec. 70 of the 1935 Amendments, on rate and claims for refund:

Amendments nos. 110 and 114: The House bill dealt with refunds and credits of taxes and with suits resulting in the recovery of taxes paid or collected under that chapter. Amendment No. 110 inserts appropriate provisions.

The first proviso (sec. 27 (a)) relates to the effective date of the limitation imposed by section 3312 (a) of the Revenue Act of 1926, as amended by section 1111 of the Revised Statutes, as amended by section 1 of the Act of March 3, 1931, and as further amended by section 803 (a) of the Revenue Act of 1932. As amended by section 803 (a) of the Revenue Act of 1932, section 3312 (a) provides that no refund of any tax shall be made unless a claim therefor is filed by the taxpayer within three years next after the payment of such tax, or within two years next after the mailing by the Commissioner to the taxpayer of a notice of disallowance of any part of the claim filed within the time prescribed in such section 3312 (a), as amended. The proviso in question provides that the limitation imposed by section 3312 (a), as amended, shall not apply to any claim filed before the date of the enactment of the Act, or to any claim filed after such date of enactment but based upon a payment made before such date of enactment, if the claim was filed within the time prescribed in section 3312 (a), as amended by section 1 of the Act of March 3, 1931, or within two years next after the mailing by the Commissioner to the taxpayer of a notice of disallowance of any part of the claim filed within the time prescribed in such section 3312 (a), as amended by section 1 of the Act of March 3, 1931. The House bill provided that the limitation imposed by section 3312 (a), as amended, should not apply to any claim filed before the date of the enactment of the Act, or to any claim filed after such date of enactment but based upon a payment made before such date of enactment, if the claim was filed within the time prescribed in section 3312 (a), as amended by section 1 of the Act of March 3, 1931, or within two years next after the mailing by the Commissioner to the taxpayer of a notice of disallowance of any part of the claim filed within the time prescribed in such section 3312 (a), as amended by section 1 of the Act of March 3, 1931. The Senate amendment struck out the House provision and inserted in lieu thereof a provision that the limitation imposed by section 3312 (a), as amended, should not apply to any claim filed before the date of the enactment of the Act, or to any claim filed after such date of enactment but based upon a payment made before such date of enactment, if the claim was filed within the time prescribed in section 3312 (a), as amended by section 803 (a) of the Revenue Act of 1932, or within two years next after the mailing by the Commissioner to the taxpayer of a notice of disallowance of any part of the claim filed within the time prescribed in such section 3312 (a), as amended by section 803 (a) of the Revenue Act of 1932. The conference agreement adopts the Senate amendment with an amendment which changes the reference to section 3312 (a), as amended by section 803 (a) of the Revenue Act of 1932, to section 3312 (a), as amended by section 1 of the Act of March 3, 1931, and as further amended by section 803 (a) of the Revenue Act of 1932. The effect of the proviso is to make the limitation imposed by section 3312 (a), as amended, inapplicable to any claim filed before the date of the enactment of the Act, or to any claim filed after such date of enactment but based upon a payment made before such date of enactment, if the claim was filed within the time prescribed in section 3312 (a), as amended by section 1 of the Act of March 3, 1931, or within two years next after the mailing by the Commissioner to the taxpayer of a notice of disallowance of any part of the claim filed within the time prescribed in such section 3312 (a), as amended by section 1 of the Act of March 3, 1931.

The second proviso of the House bill relating to refunds and credits of taxes was contained in section 27 (b) of that bill. This applied to refunds and credits of taxes accruing on or after the adoption of the amendment

Appendix.

Extracts from House Conference Report (No. 1757), pages 31-4, on the limitations proposed by Sec. 21, added by Sec. 30 of the 1935 Amendments, on suits and claims for refund:

> Amendments nos. 106 and 114: The House bill dealt with refunds and credits of taxes and suits relating to the recovery of taxes paid or accrued under the Agricultural Adjustment Act in two separate provisions.
>
> The first provision (sec. 21 (a)) related to suits with respect to taxes assessed, paid, collected, or accrued prior to the adoption of the amendatory act. In such cases no suit or proceeding was to be brought or maintained for such taxes, nor was any court to allow any recoupment, set-off, or refund of, or credit or counter claim for, any such tax. Pursuant to a final judgment or decree entered prior to the adoption of the amendatory act, such claims could be allowed. The limitations herein discussed were not to relate to overpayments of tax resulting from an error in computation, duplicate payments of tax, or to certain refunds and credits allowed by the Secretary in connection with processing of low value products, deliveries of products for charitable and other similar uses, or exportations. This provision was stricken out by Senate amendment no. 106 and the Senate matter relating to the same subject matter to it was inserted by Senate amendment no. 114.
>
> The second provision of the House bill relating to refunds and credits of taxes was contained in section 21 (d) of that bill. This applied to refunds and credits of taxes accruing on or after the adoption of the amendatory

act. Here the refund or credit was to be made or allowed only if the claimant established to the satisfaction of the Commissioner of Internal Revenue that the amount of tax claimed was not passed on to the buyer or that the claimant had repaid such amount to the buyer or ultimate purchaser. The refund or credit could also be made if the claimant filed with the Commissioner the consent of the ultimate purchaser to the allowance. In the case of the tax on hogs, the claimant had to establish to the satisfaction of the Commissioner that the amount claimed was not deducted from the price to the producer or he had to file with the Commissioner the producer's consent to the allowance of the refund or credit. The provision contained exceptions relating to low-value products, products for charitable uses, and exportations similar to those in section 21 (a). This provision was stricken out by amendment no. 114 and the Senate matter corresponding to it was inserted in the new matter in that amendment.

In the matter proposed to be inserted by the Senate amendment no distinction is made between claims and suits thereon on the basis of whether the taxes accrued before or after the adoption of the amendatory act. The conference agreement adopts this principle.

The Senate amendment does not deny access to the courts on back taxes as did the House bill. The conference agreement adopts this principle.

The Senate amendment required, in the case of both back taxes and future taxes, that the claimant (in order to have his claim prevail either before the Commissioner or before the court) establish that he had not passed the

amount of tax claimed on to the purchaser or back to the producer. This provision embodies the doctrine that no taxpayer ought to be unjustly enriched by a return of the tax if in fact he had not borne it. The conference agreement adopts the substance of this provision and expands and clarifies it to require the claimant to show that no person under the claimant's control or in control of the claimant passed on or back to any person the amount of tax claimed, that such amount was not included in a charge or fee for processing, and that the price paid by the claimant or any other person was not reduced by any part of such amount.

Under the Senate amendment, the facts required to be established to obtain the relief could be established before the Commissioner or before the court in any judicial proceeding relating to the claim. Under the Senate amendment the matter is determined on the basis of evidence taken by the court. Under the conference agreement a transcript of the hearing before the Commissioner is filed with and certified to the court and that record constitutes the evidence in the proceeding. No trial *de novo* on the facts by the court is provided for as is provided in the Senate amendment nor can judicial proceedings be brought in the absence of the prior administrative hearing and record. This provision applies to suits against the collector as well as against the United States and applies if the issue comes up in connection with any other suit involving the United States or the collector and the claimant.

The provisions of the conference agreement heretofore discussed do not apply to the follow-

ing refunds or credits: (1) Refunds or credits with respect to the processing of low value products under section 15 (a) of the act; (2) refunds or credits of tax on products for charitable use under 15 (c); (3) floor stocks tax refunds or credits under section 16; (4) refunds or credits of taxes on articles exported to foreign countries or to certain possessions under section 17 of the act; or (5) refunds or credits of tax on tobacco products for consumption beyond the jurisdiction of Federal revenue laws under section 317 of the Tariff Act of 1930.

The conference agreement strikes out a provision not contained in the House bill but inserted by the Senate amendment which required the establishment of the facts with respect to absorption of the tax by the taxpayer in Federal and State court suits for damages for the collection of the tax.

The conference agreement also inserts a provision relating to refunds and credits of floor-stocks taxes. The refunds or credits authorized under this provision are to be made to persons other than the processor or other person who paid the tax. The provision is applicable, for the most part, to wholesalers and retailers. If the processing tax is held invalid by reason of the Constitution, such persons having floor stocks on hand are entitled to the same refund or credit which they would be entitled to under section 16 (a) and (b) of the act had the tax terminated by proclamation. The claimant must establish to the satisfaction of the Commissioner, after notice and opportunity for hearing, that the tax was included in the price to the claimant. In judicial proceedings relating to such claims the findings and

record of the Commissioner constitute the evidence as in the case of suits by processors heretofore discussed.

The conference agreement also inserts a provision providing a special statute of limitations on suits for taxes based on the invalidity of the act. A claim must be filed with the Commissioner within 6 months after the tax has been finally held invalid. No suit can be begun before 1 year after the filing of such claim, unless the Commissioner renders a decision thereon within that time, or after 5 years after payment unless suit is begun within 2 years after disallowance of the part of the claim to which the suit relates. The Commissioner is required to send notice of disallowance to the taxpayer within 90 days after disallowance.

The conference agreement also removes, in cases to which the subsection relates, the limitations of the present law on the jurisdiction of United States district courts under which they cannot entertain suits of this character against the United States, if the claim exceeds $10,000. The effect of the agreement is to authorize such courts to take jurisdiction, if otherwise within district court jurisdiction, regardless of the amount in controversy.

Amendment no. 107: This amendment makes clerical changes in section number and subsection letter. The House recedes.

Amendment no. 108: Under the House bill, in probate, administration, bankruptcy, or other similar proceedings the claim of the United States for taxes under the Agricultural Adjustment Act and interest and penalties thereon was required to be allowed and ordered to be paid. The House bill permitted the reservation in the court's order, notwithstanding such allowance and payment, of the right to maintain

a claim for credit or refund of such amount and suit thereon. In such cases the claim and suit were reserved for disposition according to the provisions of law made applicable thereto by section 19 of the Agricultural Adjustment Act. This amendment broadens the provision to include all applicable provisions of law including those discussed in connection with amendments nos. 106 and 114. The House recedes.

Amendment no. 110: This is a clarifying amendment, and the House recedes.

Amendment no. 111: The House bill legalized and ratified taxes imposed under the Agricultural Adjustment Act prior to the adoption of the bill. This amendment includes tax penalties and interest within the provision. The House recedes.

Amendment no. 112: The House bill, in providing for legalization and ratification of taxes imposed under the act, states that they shall be validated as fully as if each such tax had been specifically fixed by Congress on May 12, 1933 (the date of the enactment of the original Agricultural Adjustment Act). This amendment strikes out the specific date, May 12, 1933, and makes the provision read "by prior act". The effect of the amendment is to make this legalization and ratification effective as if there had been in existence, immediately prior to the occurrence of the particular action ratified and legalized, an act of Congress authorizing such action. The House recedes.

Amendment no. 113. This amendment legalizes and ratifies all rental and benefit payments, all agreements with producers, and the adoption of other voluntary methods, prior to the date of the amendment. The legalization and

ratification is made effective as if there had been in existence, immediately prior to the taking of the particular action ratified and legalized, an act of Congress authorizing such action. The House recedes with an amendment including within the types of action legalized and ratified the initiation, if formally approved by the Secretary of Agriculture prior to the date of the adoption of the amendment, of adjustment programs under section 8 (1) of the Agricultural Adjustment Act.

Amendment no. 115: This amendment authorizes the Commissioner of Internal Revenue or his agents designated for the purpose, in connection with the establishment, by any claimant, of the facts required to be established by Senate amendment no. 114 as a prerequisite to obtaining any recovery, recoupment, set-off, refund, or credit, to examine books, papers, records, or memoranda bearing upon such facts, to require the attendance of the claimant or any officer or employee of the claimant or any other person having knowledge in the premises, and to take their testimony, with the power to administer oaths. The information thus obtained by the Commissioner is to be made available to the Secretary of Agriculture upon written request therefor; but must be kept confidential by the Department of Agriculture. Penalty is provided for violation of this requirement by any officer or employee of the Department. There was no comparable provision in the House bill. The conference agreement retains the substance of the Senate amendment with an additional provision specifically authorizing the Commissioner or any collector designated by him to summon witnesses on behalf of the United States or any

claimant, to appear and produce books, papers, correspondence, memoranda, or other records deemed relevant or material by the Commissioner, and give testimony or answer interrogatories. The provisions of Revised Statutes 4174 and 4175, relating to service of summons and proceedings upon failure to obey a summons, are made applicable to any summons issued under the subsection, and witnesses summoned are to be paid the same fees and mileage as are paid witnesses in the courts of the United States.